F. M. S.

[ORIGINAL CIVIL JURISDICTION]

THORNE, Ag. C.J. February 10, 1933.

RE: G. KRISHNASAMI

EX PARTE: KHOO IT GHEE

[SELANGOR BANKRUPTCY No. 254 of 1932]

Bankruptcy—Practice—Cross-examination of Debtor.

The rule with regard to the attendance of deponents for cross-examination on affidavits, and the consequence of the failure so to attend, is the same in bankruptcy as in ordinary civil proceedings.

When a debtor files an affidavit opposing the making of a receiving order, and fails to appear for cross-examination although notice to cross-examine has been given, the affidavit cannot be read in his absence.

L. R. Chandran for the Petitioning Creditor.

G. K. Narayan for the Debtor.

THORNE, AG. C.J.—This was a petition for a Receiving Order against G. Krishnasami, the act of bankruptcy alleged being failure to comply with the requirements of a bankruptcy notice.

The petition alleged that the debtor had resided for the greater part of six months next preceding the presentation of the petition at No. 9, Princes Road, Kuala Lumpur. The bankruptcy notice was served upon the debtor under an order for substituted service; the petition was served similarly (see the order of 1st December, 1932). The debtor gave notice that he intended to oppose the making of a Receiving Order as prayed for the reasons set out in his notice of the 23rd December, 1932. On the hearing of the petition before me, counsel for the debtor argued that the Court had no jurisdiction to make a Receiving Order for the reason that it was not shown that the debtor had resided in Kuala Lumpur for the greater part of six months prior to the presentation of the petition. Counsel relied upon the affidavit of the debtor of the 31st December, 1932, and the affidavits subsequently filed on his behalf. I regarded the statements made in this affidavit with some suspicion in view of the subsequent affidavits of Ooi Eng Siew of the 16th January, 1933, and the 8th February, 1933.

At a later stage in the argument, counsel for the petitioning creditor drew my attention to the fact that on the 5th January, 1933, he had served upon the solicitor for the debtor a notice requiring the debtor to attend the Court in order that he might be cross-examined on his affidavit of the 31st December, 1932.

The debtor failed to attend as required by that notice.

The rule with regard to the attendance of deponents for cross-examination on affidavits, and the consequence of the failure to so attend, is the same in bankruptcy as in ordinary civil proceedings—see *In re Bottomley, ex parte Brougham*, (1915) 84 L.J. K.B. 1020. This rule of practice ordains that if a deponent fails to attend and submit himself to cross-examination in response to such a notice his affidavit cannot be read.

The question was one of fact, namely, as to where the debtor had resided during the six months immediately preceding the presentation of the petition. I held that the affidavit of the debtor must be disregarded, although in fact it had been read before my attention was drawn to the service of the notice requiring him to attend for cross-examination. If this and other affidavits filed on the part of the debtor be disregarded, there is no evidence to show that the debtor was not residing in Kuala Lumpur as alleged by the petitioning creditor. That being so the only course for me was to make a Receiving Order and Order of Adjudication.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J. March 9, 1933.

BOOTA SINGH ..... **Appellant.**

vs.

PUBLIC PROSECUTOR ..... **Respondent**

[PERAK CRIMINAL APPEAL No. 1 of 1933]

Evidence Ordinance, Sections 8 and 32—Police Report—Admissibility.

A report to the police made by the deceased against the accused several months before the murder of the deceased is not admissible under Section 32 of the Evidence Ordinance. It is admissible under Section 8, not as evidence of the truth of the allegations of the deceased against the prisoner, but as showing the relations between the parties and in support of the motive alleged by the prosecution.

J. Dunford Wood for the appellant.

Raja Musa, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—In this case a report made by the deceased against the prisoner nine months before the murder was admitted in evidence by the trial Judge, as showing a motive for the crime. Counsel for the appellant argued:—

(*a*) that the report was inadmissible under any Section of the Evidence Ordinance, and

(*b*) that if it was wrongly admitted, it must have influenced the whole course of the trial, and that the accused was entitled to an acquittal.

The report was proved by the Lance Corporal No. 1288, Batu Gajah, who recorded it and by the police constable No. 1971, who interpreted it. In view of sections 91 and 92 of the Evidence Ordinance, evidence of what the woman said could not be given in any other way. These sections, however, only deal with the method of proof, and do not affect the admissibility of the document in question.

I think counsel was correct in saying that the report was not admissible under Section 32(i), which is limited to statements by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. The report made nine months previously cannot strictly be regarded as a report about any circumstances which resulted in the murder.

The report was, however, put forward by the prosecution as showing or constituting motive under Section 8. It indicated that the deceased was on bad terms with the accused, and supported the oral evidence to the same effect. The conduct of the deceased in making a report against the accused is made relevant by the express terms of Section 8. Generally speaking, a statement is not 'conduct' within the meaning of the Section. but in this case the statement accompanied and explained the deceased's act in making the report. It is accordingly expressly admissible in terms of explanation (i) of Section 8.

It should be added that the report is not evidence of the truth of the deceased's allegation against the prisoner. It was admitted in evidence by prisoner's counsel at the trial, and although this is by no means conclusive that the report should be admitted, it is I think clear that the reason why counsel admitted the report was because it was brought out in evidence that after the subject matter of the report had been investigated, no action was taken by the police, and this was *pro tanto* favourable to the prisoner; and it can be presumed in the prisoner's favour that the deceased's allegations were not true. The fact, however, that the report was made still remains and is admissible as showing the relations between the parties and in support of the motive alleged by the prosecution.

The learned Chief Justice then proceeded to deal with the remainder of the case.

WHITLEY, J.—I would dismiss this appeal. The case for the appellant was very ably argued by Mr. Dunford Wood, but in my opinion there was overwhelming evidence upon which the Assessors and the Judge could convict. The only difficulty which I feel is in connection with the report made by the deceased woman against the accused on the 10th January, 1932—ten months before her death. No objection was taken to admissibility of this report at the trial, but it was argued before us that it was not admissible under Sections 8 and 32 of Evidence Ordinance, and that being hearsay evidence, it could not be admissible unless it came within one of these Sections.

Section 8 reads:—

> "Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

There can, in my opinion, be no doubt that the fact that a report was made by the deceased against the accused, is admissible under this Section. The mere making of such report in itself indicates that there has been some trouble between the parties, and may constitute a motive. That such a report would be admissible in England appears clear from the case of *R.* v. *Buckley*, 13 Cox C.C. 293, in which it was held that in order to prove motive against the accused, the deposition of the deceased against him taken before the Magistrate on another charge was tendered in evidence and held admissible. The best evidence of that report is the report recorded by the police officer in the report book in accordance with law, and even if the person who made the report was still alive and able to give evidence, that written report would still be the best evidence of what was reported. But the report is no evidence whatsoever of the truth of what is stated in the report; and when evidence of this description is adduced by the prosecution the jury or assessors, as the case may be, should be directed to this effect. They should be told that there is nothing to show whether the report was true or false, and that the only evidential value of the report is to show that in fact a report was made.

Although this was not done in the present case, I am quite satisfied that the omission did not occasion any miscarriage of justice, and that on the evidence, apart altogether from the report the assessors could come to no other conclusion than that the accused was guilty.

The learned Judge then proceeded to deal with the remainder of the case.

MCFALL, J.—Boota Singh, appellant, has been tried and convicted of the murder of a woman named Harnam Kaur on the 11th October, 1932, near Pusing.

Deceased was Hernam Singh's wife. Deceased, Hernam Singh, Kapur Singh and appellant all lived in one house together. Appellant had lived thus with them for about one year before the murder.

On 10th January, 1932, deceased lodged a complaint No. 21/32 at Pusing Police Station that appellant tried to misbehave with her, and had threatened to stab her. This report was admitted in evidence at the trial. Appellant contends that this report was wrongly admitted in evidence.

Section 32 Evidence Ordinance regulates the relevancy of statements written or verbal of a person who is dead. As deceased on 10th January, 1932, had not received the injuries which terminated in her death, her complaint is not relevant under Section 32 Evidence Ordinance.

Section 14, illustrations (i) and (o) Evidence Ordinance, shew that the fact that appellant had tried to misbehave with deceased and wanted to stab her on 10th January, 1932, is relevant as showing appellant's intention towards deceased.

By Section 8.....the conduct of any person an offence against whom is the subject of any proceeding is relevant if such conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto. Explanation 1. The word "conduct" in this Section does not include statements, unless these statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other Section of this act.

Appellant's dealing with deceased drove deceased to lodge and sign a report at the police station against him. The statement then recorded explains her action, and becomes relevant: I am of opinion that the report was rightly admitted in evidence under Section 8.

The learned Judge then proceeded to deal with the remainder of the case.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

GERAHTY, J. March 23, 1933.

LEE KIN ..... **Plaintiff.**

vs.

CHAN SUAN ENG.....**Defendant.**

[PERAK CIVIL SUIT No. 597 of 1932]

Mining Sub-Lease under Mining Enactment, 1911,—Effect of subsequent legislation—Mining Enactment, 1928, and Tin and Tin-ore (Restriction) Enactment, 1931.

By a sub-sub-sub-lease dated the 3rd October, 1927, the defendant sub-leased to the plaintiff certain land for a period of five years and renewals thereof subject to the provisions of the Mining Enactment, 1911.

Subsequently the Mining Enactment, 1928, and the Tin and Tin-ore (Restriction) Enactment, 1931, came into force. The former Enactment, apart from repealing the Mining Enactment, 1911, effected changes in the status of sub-sub-sub-leases, and the rules made under the latter Enactment materially affected mining operations and the interests of parties to mining leases entered into prior to it becoming law.

In an action for specific performance that the defendant should execute in favour of the plaintiff a renewal of the sub-sub-sub-lease for a period of one year: *Held*, that there was nothing in the sub-sub-sub-lease from which it appeared that the parties intended to bind themselves with reference to the future state of the law, and the presumption was that the parties intended to contract with reference to the law existing at the time the contract was made.

E. C. Watson for the plaintiff.

G. Terrell for the defendant.

Cur. Ad. Vult.

GERAHTY, J.—In this case the plaintiff claims an order for specific performance by the defendant of her obligations under a registered memorandum of sub-lease (No. 196/27 of sub-lease 112/27 of sub-lease 111/27), and dated 3rd October, 1927, to execute in favour of the plaintiff a renewal for a period of one year and alternatively for a declaration that the plaintiff shall be at liberty to work the land in terms of the said sub-sub-sub-lease for a period of one year from the date of such order.

The plaintiff further claims damages for failure to renew the sub-sub-sub-lease until the same is renewed.

The memorandum of sub-lease referred to, and marked "A" herein, contains the following covenant:—

> "I Chan Suan Eng (f) of Taiping (defendant in this suit) hereinafter called the sub-sub-lessor
>
> "Do hereby sub-sub-lease to Lee Kin of Kampar (plaintiff in this suit) hereinafter called the sub-sub-lessee all that portion....., for the period of five (5) years and renewals thereof subject to the provisions of 'The Mining Enactment, 1911,' and to the following conditions," etc.

The first question to be considered is what is the construction to be given to the words " and renewals thereof." In my view these words when read with the words " for the period of five years," immediately preceding them must be construed to refer and to have been intended by the parties to refer, to renewals for further periods of five years at the option of either of them, subject always to the continued operation of the head lease, Exhibit "D" in this suit.

On this construction then the plaintiff would be entitled to a renewal of the sub-sub-sub-lease for a further period of five years as from the 3rd October, 1932, subject to the provisions of "The Mining Enactment, 1911," and to the conditions, restrictions and exceptions contained in the memorandum.

The further question then arises as to whether on the 3rd October, 1932, it was possible for the defendant to perform her obligations on the covenant to renew the registered sub-sub-sub-lease on the terms and conditions contained in the memorandum. It cannot be disputed that the terms and conditions of the contract made